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Supreme Court of the United States
No. 1251

ANTHONY B. CATALDO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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INDEX

PAGE

(a) Decisions Below 1

(b) Jurisdiction 1

(c) Questions Presented for Review 2

(d) Constitutional Provisions and the Statutes Involved 4

(e) Statement of Case 11

(f) The Jurisdiction of the United States Court of Claims 13

(g) Argument 14

The Assignment of April 16, 1964 from Marine Midland Trust Company to petitioner was valid and his suit should not have been barred 14

POINT II—In any event, petitioner's second cause of action for payment of one-half of the fund by reason of petitioner's charging lien upon the fund should not have been barred 21

CITATIONS OF CASES

Beaconwear Clothing Company et al. v. United States, Ct. Cl. 226-59, decided 1/21/66 .....13, 14, 20

Brookes v. Mandel-Witte Co. (2 C. A. 1932), 54 F. (2) 992, cert. den. 286 U. S. 509 22

California Bank v. U. S. Fidelity Guarantee Co., 129 F. (2) 751 18

Dickinson v. Stiles, 246 U. S. 631 23

Empire Ordnance Corporation etc. v. United States, 130 Ct. Cl. 719 (1955) 13, 14

Erwin v. United States, 97 U. S. 392 22

Goodman v. Niblack, 102 U. S. 556, 560 22

Kearney v. United States, 152 Ct. Cl. 202 (1961) 13, 14

Leonard v. Whaley, 91 Hun 304, 36 N.Y.S. 147; Ann. 12 A.B.R. (2) 460, 468, 475 (1950) 18

PAGE

Malman v. United States (2 C. A. 1953), 202 F. (2) 483 22

Martin v. National Surety Corporation, 300 U. S. 588, 594, 595 ..... 16, 17, 18, 19, 23

Pittman v. United States, 127 Ct. Cl. 173 (1953) 13, 14

Royal Indemnity Company v. United States, 93 F. Supp. 891 18

Segal v. Rochelle, case decided January 18, 1966, U. S. Sup. Ct. 16, 17, 18, 19, 21

United States v. Aetna Casualty Co. & Insurance Co., 338 U. S. 366 21

CONSTITUTIONAL, STATUTORY, REGULATORY AND MISCELLANEOUS CITATIONS

Title 28 U.S.C. Section 1255 (1) 2, 9

Section 475 Judiciary Law of New York 3, 10, 13, 16, 22, 23

Assignment of Claims Act, 31 U.S.C. Section 203 ..... 4, 12, 14, 19

Assignment of Claims Act, 1940—41 U.S.C. Section 15 ..... 7, 13, 14, 19, 20

Statute Relating to Jurisdiction of the Court of Claims, 28 U.S.C. Section 1494 ..... 10, 13

Rule 23, Rules of the United States Court of Claims .. 11, 18

APPENDIX

Complaint 24

Agreement of March 20, 1962 28

Agreement of May 23, 1963 31

Agreement of April 16, 1964 34

Decision and Final Judgment Below of Dismissal of January 24, 1966 36

Supreme Court of the United States

ANTHONY B. CATALDO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE, THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES SUPREME COURT:

Petitioner, respectfully prays this court for a writ of certiorari to the United States Court of Claims to review the latter's judgment dismissing the complaint of the petitioner stating three causes of action and filed to recover the sum of $17,516. from the United States of America.

(a) Decisions Below

The opinion of the honorable court below has not been reported in any official report, but it is designated in that court by the number 157-65.

(b) Jurisdiction

There has been a final judgment rendered by the United States Court of Claims dismissing the whole complaint of the petitioner on motion of the United States of America, a review of which is being sought because said decision conflicts with the applicable decisions of this court, and, it even appears that the Court of Claims has so consistently

departed from the accepted and usual course of judicial proceedings on the point involved so as to call for the exercise of this court's power of supervision. Furthermore, said decision appears to be in conflict with the decisions of the United States Court of Appeals, Second Circuit on another vital point of the case.

1. The said judgment of dismissal was entered in the office of the clerk of the Court of Claims on the 24th day of January, 1966.

2. No application has been made either for a rehearing of said dismissal or for an extension of time within which to petition for a writ of certiorari.

3. It is believed that Title 28 U.S.C. Section 1255 (1) confers jurisdiction upon this honorable court to review the said judgment of dismissal by a grant of a writ of certiorari to the United States Court of Claims.

(c) Questions Presented for Review

Are any of the three causes of action stated in the petitioner's complaint sufficient in law, assuming the facts therein alleged to be true?

a. Whether the assignment of the Marine Midland Trust Company to petitioner of the former's rights to proceeds of a settlement for $17,516 of a claim for extras made by Ove Gustavsson Contracting Co., Inc., a general contractor, against the Navy as alleged in the first cause of action was properly declared invalid by the Court of Claims in spite of the following conditions prevailing at the time of said assignment to petitioner.

(a1) The settlement between the government and the general contractor of the latter's claim at $17,516 was reached on March 20, 1963 or approximately 18 months

after the acceptance and approval of the work and final payment made upon the contract for the work originally contracted by the parties, and there were no offsets or counterclaims in favor of the United States against either the general contractor or the bank. In other words, the United States has no interest in said fund and said fund belongs to the general contractor or those claiming through him.

(a2) It further appeared that all documents necessary or required for the issuance of a warrant for the payment of said settlement fund of $17,516 had been properly and duly filed with the government by the general contractor but the government nevertheless arbitrarily and unlawfully refused to issue its warrant for payment of said fund and has continued to be in default in doing so for more than one year.

(a3) That the assignment by the general contractor to the Marine Midland Trust Company was and always had been a lawful and subsisting assignment as provided by the Assignment of Claims Act of 1940.

b. Whether the direct assignment of the general contractor of the same fund made to petitioner after all documents necessary and required for the issuance of a warrant had been duly filed by the general contractor and after it had appeared that the government had no interest in said fund by way of counterclaim or offset, as alleged in the third cause of action, was properly declared invalid.

c. Was it proper to declare invalid the claim of petitioner to one-half of said fund by reason of his charging lien thereon as established by Section 475 of the Judiciary Law of New York, it appearing that petitioner had been employed by the general contractor to recover for its claims for extras and the settlement at $17,516 was reached with the Navy as a result of the efforts of the petitioner in prosecuting said claim; in other words, was it lawful for the Court of Claims to hold invalid what was tantamount

to an assignment by operation of law by the general contractor of one-half of the recovery to petitioner by way of the general contractor's agreement to pay petitioner one-half of the recovery for petitioner's legal services in prosecuting said claims for extras.

(d) Constitutional Provisions and the Statutes Involved

The only constitutional provisions, statutes, ordinances or regulations involved are:

"*Assignment of Claims Act, 31 U.S.C. Section 203.*

"ASSIGNMENTS OF CLAIMS: SET-OFF AGAINST ASSIGNEE.

All transfers and assignments made of any claim upon the United States or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided,

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pur-

suant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for

failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued."

Assignment of Claims Act of 1940—
41 U.S.C. Section 15

"TRANSFERS OF CONTRACTS: ASSIGNMENTS OF CLAIMS: SET-OFF AGAINST ASSIGNEE

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided, 1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; 2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall

not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any

moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes of social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued."

Statute relating to Jurisdiction of this court, 28 U.S.C. Section 1255

"COURT OF CLAIMS: CERTIORARI; CERTIFIED QUESTIONS

Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant."

Statute relating to Jurisdiction of the Court of Claims
28 U.S.C. Section 1494

"SECTION 1494. ACCOUNTS OF OFFICERS, AGENTS OR CONTRACTORS

The Court of Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof where—

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States."

Sec. 475 Judiciary Law of New York

"SECTION 475. ATTORNEY'S LIEN IN ACTION, SPECIAL OR OTHER PROCEEDING

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judg-

ment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

Rule 23, Court of Claims

"RULE 23, THIRD-PARTY PRACTICE

(a) When Third Parties May Be Brought In: (1) The Court, on its own motion or on the motion of either party, may notify any person with legal capacity to sue and be sued and who appears to have an interest in the subject matter of any pending suit to appear as a party and assert his own interest therein."

(e) Statement of Case

Petitioner, a lawyer duly admitted to practice in the State of New York and lawfully practicing in such state sued the government in the Court of Claims to recover a sum of $17,516. resulting from the settlement of a claim for extras he had prosecuted for his client Ove Gustavsson Contracting Co., against the United States Navy arising out of a contract for the repair of a sea wall at the New York Naval Shipyard, between said Ove Gustavsson Contracting Co., Inc., as a general contractor and the Bureau of Yards and Docks of the United States Navy under No. NBy21183.

Said contract is dated January 23, 1959. The work required the removal of existing bulkheads to a pier and to install a fender system. The work, including all the "extras" later claimed, was completed and accepted by the government in June, 1960 and a final payment under the terms of the contract, exclusive of the "extras", was made in October, 1960. In November, 1960, the general contractor filed its claim for "extras" which was rejected and in December, it employed petitioner to prosecute said claim against the government. The terms of the retainer

were that the proceeds of any recovery was to be divided 50-50 between the general contractor and petitioner, on a no cure, no pay basis. Petitioner undertook the prosecution of the claim and finally on March 20, 1963 a settlement was reached with the Navy for the payment to the general contractor of $17,516. in final settlement of all its claims arising out of the work performed under said contract Nby21183.

One year earlier, on the 20th day of March, 1962, the general contractor had assigned all of its right, title and interest in any proceeds under the contract or amendments, etc., to Marine Midland Trust Company of New York, a recognized and lawful banking corporation. This assignment has never been attacked as invalid and presumably, it is admitted to be a proper and lawful assignment.

After the settlement was reached, the United States Navy refused to authorize the issuance of a warrant for the payment of said sum and the government was in default in the payment of said settlement monies. The government has never claimed any adverse interest in said fund for itself, not having any offsets or counterclaims against the general contractor. On April 16, 1964, said Marine Midland Trust Company assigned all monies due it under its aforesaid assignment from the general contractor dated March 20, 1962 to petitioner.

Prior thereto and on the 23rd day of May, 1963, the general contractor attempted an assignment of the same monies to petitioner by an instrument in writing executed in pursuance of the provisions of Title 31, Section 203 of the United States Code. The government was at this time in default in the payment of said settlement and it continued to refuse to pay said sum either to the general contractor, the bank or to petitioner.

The complaint states three causes of action. The first is under the assignment of April 16, 1964 received from the

bank. The third is in alternative to the first and is under the direct assignment of the general contractor or as of May 23, 1963 to petitioner. This third cause of action was pleaded in case it should be decided that the assignment in the first was invalid. Both causes of action sought the whole of the fund. The second cause of action is based upon petitioner's own right to a charging lien as the attorney for the general contractor, through whose efforts the fund was created. This charging lien is created by Section 475 of the Judiciary Law of New York. One-half of the fund as agreed compensation to petitioner was sought.

The Court of Claims dismissed the complaint in its entirety and without discussing either cause of action in any particular way said, said that plaintiff's right to recover on his claim was barred by "The Anti-Assignment Act, 31 U.S.C., Section 203 and The Assignment of Claims Act of 1940, as amended and, under the decisions of this court in *Pittman* v. *United States,* 127 Ct. Cl. 173 (1953); *Empire Ordnance Corporation, etc.* v. *United States,* 130 Ct. Cl. 719 (1955); *Kearney* v. *United States,* 152 Ct. Cl. 202 (1961) and *Beaconwear Clothing Company et al.* v. *United States,* Ct. Cl. No. 226-59, decided January 21, 1966".

Feeling aggrieved petitioner respectfully seeks a review of said decision by way of a writ of certiorari to the Court of Claims.

(f) The Jurisdiction of the United States Court of Claims

It is believed that the United States Court of Claims had jurisdiction of the subject matter of the Complaint and of the parties by reason of 28 U.S.C. Sec. 1494.

(g) Argument

The Assignment of April 16, 1964 from Marine Midland Trust Company to petitioner was valid and his suit should not have been barred

The Court of Claims has barred petitioner's claim under all three causes of action because of the prohibitions of the two Assignment of Claims Acts, 31 U.S.C. Sec. 203 and 41 U.S.C. Sec. 15, and, its decided cases *Pittman* v. *United States,* 127 Ct. Cl. 173 (1953); *Kearney* v. *United States,* 152 Ct. Cl. 202 (1961) and *Beaconwear Clothing Company et al.,* v. *United States,* Ct. Cl. No. 226-59, decided January 21, 1966.

Petitioner's claims under the first and third causes of action are based upon two voluntary assignments, and his claim under the second cause of action is based upon an assignment by operation of law. If either of the two voluntary assignments are good, then petitioner would be entitled to the whole of the fund and there would not be any need to examine the assignment by operation of law. This last should be considered, however, if both assignments do not avail petitioner the relief he seeks. The voluntary assignment which petitioner believes most strongly supports his right to recover is the one pleaded in the first cause of action, which is the assignment from Marine Midland Trust Company to the petitioner. The second assignment was made to implement the aim of having the money paid to petitioner so that he might discharge his liability to Marine Midland Trust Company which had been created by petitioner's efforts at extending and securing financial help to the general contractor. The facts that would be proven if a trial were had would be as follows:

In January, 1959, the general contractor was in financial difficulty. A contract he had with the General Services Administration had been cancelled. He was unable to com-

plete another job he had with the Corps of Engineers and he was about to start the repair job at the New York Naval Shipyard. At this same time in January, 1959, petitioner was retained to represent the general contractor. He prosecuted an appeal from the decision of the General Services Administration which had cancelled that contract. He caused work to be resumed on the job with the Corps of Engineers, paying off some of the creditors with his own money and handled several suits from creditors for the payment of the bills. He also advanced monies to the general contractor in connection with the job at the New York Naval Shipyard and he handled suits involving the claims of subcontractors for materials.

Plaintiff secured the funds necessary to help the general contractor in this manner from his bank Marine Midland Trust Company on his own note. Altogether the general contractor is indebted to petitioner for more than $25,000 for services and for monies advanced for its account.

The general contractor assigned the proceeds of its claim for extras on the job at the New York Naval Shipyard on March 20, 1962 to the bank. At this point of time, the claim of the general contractor against the government was unliquidated. It was still in the process of being prosecuted. On March 20, 1963 said claim was settled for $17,516 and all documents necessary for the issuance of the warrant to pay said sum were duly filed with the Navy. The government had and still has no interest in said sum of $17,516, and no offset or counterclaim exists in favor of the government against the general contractor or the Marine Midland Trust Company. Yet, the government refused to pay said sum to the bank. On April 16, 1964, the bank assigned its interest in said fund to petitioner and petitioner brought this action to recover thereon.

The voluntary assignment which is the subject of the third cause of action apparently would avail plaintiff nothing as it was made on May 23, 1963 at which time the general

contractor had previously assigned his interest to the bank. It is not relied on here unless it should be held that the assignment to the bank was invalid for all purposes.

The Court of Claims, it is submitted, erred in barring petitioner's claims under these voluntary assignments because the prohibition of the Assignment of Claims Act are not operative where the government has no interest in the funds. Nor are the prohibitions of said Acts controlling upon the assignment by operation of law. While the cases previously decided by the Court of Claims and relied upon by the court to dismiss petitioner's claim might have been controlling upon the court yet they are in conflict with the decisions of this court such as *Martin* v. *National Surety Corporation*, 300 U. S. 588, 594, 595, which was re-affirmed by this court by its decision on January 18, 1966 in *Segal* v. *Rochelle*. There are many cases affirming the general purpose of the statute to be to protect the government, not to enable it to escape liability for a just debt. Said cases relied upon by the Court of Claims are moreover distinguished from the lien of petitioner created by Section 475 of the Judiciary Law, by the fact that at the time of the assignments to petitioner, it was an established fact that the government had no interest in the funds and the reasons for the protective provisions of the acts and the decisions did not exist. Simply and succinctly, put, petitioner's position is that the prohibitions of the Assignment of Claims Acts do not apply to assignments of monies due from the government where there is no offset or counterclaim by the government against such monies. Of course, the government would continue to have an interest in an unexecuted contract. In such a case, the assignment would probably fall within the prohibitions of the Acts. Such were the facts in each of the cases relied upon by the Court of Claims. However, where there is no government interest in the fund whatever, and where all the formalities for the issuance of a warrant have been complied with, and still the government refuses to pay the money, then it is in default and the

claim against the government ought not to be barred and it is not apparently barred by the Assignment of Claims Act because there would be no reason to protect the government. If this is the true intent of the cases in this court such as *Martin* v. *National Surety Corporation,* then the petitioner's claim under his assignment from the bank is not barred. Admittedly, the government has no interest in the fund. It was a settlement of a claim long after the work under the contract had been completed, accepted and paid for. The continued withholding of the monies by the government, according to the rules of the market place, is unlawful and a breach of its contract of settlement and of the underlying obligation to pay the fair and reasonable value of an "extra" performed by the general contractor and accepted by the government.

It is conceded that the prohibitions of both Assignment of Claims Act operates to nullify an assignment of claims against the government by contractor while such claims are unliquidated or the contract under which such claims arise is in the process of being performed. However, it is the consensus of the decided cases that the Statutes in question were passed for the benefit of the government, to avoid its embroilment in conflicting claims with third parties, as to whether the government could or could not offset its other claims against the contractor against the claims of the assignee. Up to *Martin* v. *National Surety Corporation,* there seems to have arisen two lines of decisions, one adhering strictly to the wording of the statute and holding assignments incapable of transferring the right of the contractor to receive monies from the government and the other holding that the statutes must be construed in the light of its purposes to give protection to the government (p. 596). Judge Cardozo in the *Martin* case writing for this court said that as between the two lines of cases the second must be held to be supported by better reason (p. 597). This decision was by a unanimous court. *Segal* v. *Rochelle* was by a unanimous court. This court

in *Segal* v. *Rochelle* said of *Martin* v. *National Surety Corporation,* "While other circumstances encouraged Martin to uphold the assignment and this court has not faced the problem head-on since that time, we find no reason to retreat now from the basic holding in *Martin* which was both anticipated and followed by a number of other Courts, state and federal (see *California Bank* v. *U. S. Fidelity Guarantee Co.,* 129 F. (2) 751; *Royal Indemnity Co.* v. *U. S.,* 93 F. Supp. 891; *Leonard* v. *Whaley,* 91 Hun 304, 36 N.Y.S. 147; Ann. 12 A.B.R. (2) 460, 468, 475 (1950)." In *Martin,* the money had already been paid and it was placed in *custodia legis* to await the decision as between two contending creditors. The claim was advanced that the assignment to the surety, one of the contending parties, was void as contravening the Assignment of Claims Acts. The court held that the act was for the protection of the government and since the government had no interest in the fund the prohibition of the act could not bar the recovery on the assignment. The court then proceeded to define the rights among the parties *inter sese.* Here, the money has not yet been paid. The government, however, is not entitled to keep it. There is no valid reason for it to keep it from the parties rightfully entitled to it. Admittedly, one Hanover Insurance Company, an assignee of Massachusetts Bonding and Insurance Company the surety on the bond given to secure the performance of the job at the New York Navy Yard has written the Navy to hold up the payment, but that party's claims could be ascertained in the suit in the Court of Claims by the simple expedient of impleading it. See Rule 23 of the Rules of the United States Court of Claims. Dismissing this complaint is no road to a settlement of the controversy. The fact is that by its unlawful refusal to issue a warrant for the payment of this sum to the bank assignee, and allowing the latter to collect the fund, the government now finds it necessary to invoke the prohibitions of the statutes to continue its unlawful with-

holding of the fund. It cannot by its own wrong claim a right arising from that wrong.

But the considerations go deeper. The Court of Claims has, as is evident by its decision in this case, consistently upheld the literal application of the statutes in disregard of the rule of the *Martin* case. It probably did not know of the *Segal* v. *Rochelle* case decided by this court a few days earlier upholding the basic tenet that the statutes should be interpreted in the light of the protection afforded to the government. If it will not serve the government any purpose to bar a suit upon an assignment from the government creditor, the assignment should not be held invalid. The Court of Claims should not refuse to uphold the assignment. The government should pay the money. To withhold the money would encourage embroilment and litigation. The action taken by the Court of Claims in this case instead frustrates the purposes for which the statutes were passed, and, it contravenes the principle of the decided cases of this Court on the point.

It may be that in view of *Segal* v. *Rochelle,* the Court of Claims might, in the future, change its views but then this case goes further than Segal. This case provides the Court of Claims with an opportunity of using its machinery to keep the United States free of double liability or embroilment of all kinds by accepting the duty of deciding who as between contending third parties is entitled to a fund in which the government has no interest. Instead, its adherence to the narrow interpretation of the acts has caused it to throw all parties out of court leaving them to litigate in other courts or seek other modes of redress, instead of obtaining the solution where the problem really belongs, in the Court of Claims.

Another view of the matter is that notwithstanding the limitations of 31 U.S.C. Section 203, it is provided in 41 U.S.C. Section 15 that assignments to a bank, trust company or other financial institution are permitted under the

circumstances described there. There is no claim here that the Marine Midland Trust Company failed of compliance with any of the conditions which might have defeated its assignment. It must therefor be assumed that the assignment to the bank was a lawfully existing assignment as provided under 41 U.S.C. Section 15. That section further provides:

> "Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes."

This special provision of the statute invests assignments lawfully made under that section with a certain inviolability. It creates a self-executing guarantee of validity. This shield it is stated is "for all purposes". Why, then, wasn't it sufficiently valid to enable the bank to assign its interest to petitioner? There is no prohibition or proscription against the bank's transference of its rights under the assignment it had received. There is a provision that the assignment "shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing". This is exactly what was intended by the assignment of the bank to petitioner. It was intended that petitioner would sue for the money which was being withheld to enable the petitioner to reduce his indebtedness to the bank. There are no cases expressly dealing with this provision of the statute except *Beaconwear Clothing Company, et al.* v. *United States,* Ct. Cl. No. 226-59 cited by the Court of Claims in its decision in this case. That case is different on the facts from this case primarily because the assignment and reassignment were made with the contract still in an executory state and when it came to a determination of the accounts of the original contractor with the government, the government proved it

had counterclaims in excess of the amounts found due the original contractor. No such fact situation is present here.

The point would appear to be a recurring one because of the protection it would afford one not a bank or financial institution to extend credit to a government contractor under the protection of a valid assignment to his bank. A decision by this court would be most helpful. Furthermore, the incongruous situation appearing from the fact that the assignment to a bank shall be valid for all purposes, any law to the contrary notwithstanding, yet it may run afoul of an obscure provision of another of its provisions of the same section, would seem to require clarification. If a bank has an assignment which is good for all purposes why isn't it able to transfer it to another? A decision on this point would be most helpful to all concerned in government contracts, Court of Claims especially, if the latter should be required to or voluntarily take the initiative in interpleading third parties to try out all contending claims to a fund in which the government has no interest except to ascertain to whom to pay it.

POINT II

In any event, petitioner's second cause of action for payment of one-half of the fund by reason of petitioner's charging lien upon the fund should not have been barred.

Again, reverting to this court's decision in *Segal* v. *Rochelle, supra,* we find that the Assignment of Claims Acts do not prevent assignments by operation of law from taking effect. This court in *Segal* v. *Rochelle* cited *United States* v. *Aetna Casualty and Insurance Company,* 338 U. S. 366, a case which reviews the history and purposes of the statutes and stated flatly, that all assignments by operation of law are beyond the prohibitions of the statute. In the Aetna decision, this court specifically declined to

accept the suggestion of the government that procedural aspects of an assignment by operation of law might invalidate the claim of the assignee. Instead, this court emphasized that all assignment by operation of law, not just certain ones, were beyond the limitations of the statutes. The court cited with approval and quoted from early cases, *Erwin* v. *United States,* 97 U. S. 392 and *Goodman* v. *Niblack,* 102 U. S. 556, 560 and others which had held that assignments by operation of law were not effected by the statutes.

Yet, petitioner's claim under the second cause of action is to recover one-half of the fund by reason of the fact that that was petitioner's fee for his services in prosecuting this claim of the general contractor for extras which had resulted in the settlement of $17,516. The petitioner under Section 475 of the Judiciary Law of New York (the retainer agreement was made in New York) acquired a charging lien to the extent of his fees upon the funds created by the services of the petitioner and by operation of that statute, he is permitted to have a lien thereon wherever the said fund may be found. This statutory lien arising under the laws of New York was the subject of the consideration of the United States Court of Appeals, Second Circuit on a claim that such was subject to the prohibitions of the Assignment of Claims Acts, but that court held that they were not. The Court of Appeals said flatly that an attorney's charging lien under said Section 475 creates an assignment by operation of law which would exclude it from the limitations of the statutes. See:

Brookes v. *Mandel-Witte Co.* (2 C. A., 1932) 54 F. (2) 992, cert. den. 286 U. S. 509;
Malman v. *United States* (2 C. A. 1953) 202 F. (2) 483.

Hence, the decision of the Court of Claims not only departs from a well established line of cases of the Court

of Appeals Second Circuit (which is in the better position to deal with New York law), but also it is at variance with the import of a well established line of decisions of this honorable court. It is also an inequitable result, denying to petitioner the fruits of his labors in behalf of the general contractor. As this court said in *Dickinson* v. *Stiles,* 246 U. S. 631, Congress could not have contemplated that suits would be tried by lawyers for nothing.

The treatment of the second cause of action is further manifestation of the disregard by Court of Claims of the rule excluding assignments from the operation of the statute when they serve no purpose in the protection of the government. Apparently, the Court of Claims is too strictly applying the effects of the statutes. At least, it would appear to be so from the fact that it has continued to decide the cases it relied upon in this case even after *Martin* v. *National Surety Corporation.*

This case affords this court an opportunity to correct that too strict a view of the statutes and to settle the inconsistency between the views of the Court of Claims and the Court of Appeals, Second Circuit in the treatment accorded to charging liens under Section 475 of the Judiciary Law of New York.

WHEREFORE it is prayed that this court grant its writ of certiorari to the Court of Claims to review the order of that court of January 24, 1966 dismissing the complaint of the petitioner.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney pro per se.

APPENDIX

Complaint

IN THE

UNITED STATES COURT OF CLAIMS

No. 157-65

ANTHONY B. CATALDO,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION

TO THE HONORABLE, THE CHIEF JUSTICE AND THE JUDGES OF THE COURT OF CLAIMS:

The above named petitioner by his attorney Denis K. Lane respectfully represents:

1. Plaintiff is an attorney at law duly admitted to practice in the Courts of the State of New York, in the United States District Courts for the Eastern and Southern districts of New York, in the United States Court of Appeals, second circuit, and in the United States Supreme Court, and maintains his offices for the practice of law at One Cedar Street, Borough of Manhattan, City and State of New York.

2. That Ove Gustavsson Contracting Co., Inc. is a corporation organized and existing under the laws of the State of New York with an address at 89-15 144th Street, Jamaica, New York.

3. That the Marine Midland Trust Company is a state banking corporation duly authorized to do a banking business by the State Banking Department of the State of New York and has an office and place of business at 110 William Street in the Borough of Manhattan, City of New York.

4. That on or about January 23, 1959 the United States of America, Department of Navy, Bureau of Yards and Docks entered into a contract in writing with said Ove Gustavsson Contracting Co., Inc., to repair a sea wall and replace fenders at Pier G in the New York Naval Shipyard which contract bears #N By-21183, and before the final settlement under said contract, the said general contractor filed a claim for extras which claim was finally settled on or about March 20, 1963 for a total sum of $17,516 and the said sum is now due and owing from the said Bureau of Yards and Docks under said contract.

5. That the plaintiff had been retained as attorney by Ove Gustavsson Contracting Co., Inc. in respect of its legal relations with the government on the contract in question and in many other matters, as a consequence of which, plaintiff rendered various and sundry services of a professional nature and he paid or incurred various and sundry sums of monies in connection with and incidental to said professional services and furthermore, he advanced various other sums of money to said Ove Gustavsson Contracting Co., Inc., during the performance of the said contract bearing #NBy-21183 at the special instance and request of said contractor, and that by reason of all of the foregoing there is now due and owing to the plaintiff at least the sum of twenty-five thousand dollars.

6. On or about the 20th day of March, 1962 Ove Gustavsson Contracting Co., Inc. duly assigned all of its rights, title and interest in the said claim for extras under contract

#NBy-21183 to Marine Midland Trust Company of 110 William Street, New York 38, New York.

7. That on or about the 16th day of April, 1964 the Marine Midland Trust Company duly assigned its interest in the aforesaid assignment by Ove Gustavsson Contracting Co., Inc. dated March 20, 1962, to the plaintiff.

8. The Bureau of Yards and Docks has refused to pay the said sum of $17,516 either to the Marine Midland Trust Company or to the plaintiff although due application therefore has been made.

AS AND FOR A SECOND CAUSE OF ACTION AS AN ALTERNATIVE IN THE EVENT PLAINTIFF DOES NOT PREVAIL ON THE FIRST CAUSE OF ACTION

9. Ove Gustavsson Contracting Co., Inc. and this plaintiff agreed that plaintiff shall prosecute and present the claim for extras as aforementioned under contract #NBy-21183 and on its part Ove Gustavsson Contracting Co., Inc. agreed to pay the plaintiff for such services rendered by the plaintiff in the prosecution of such claim, 50% of any award made to it, whether by settlement agreement, suit, proceedings or otherwise.

10. That by reason of the recovery of the aforesaid sum of $17,516 one-half thereof or the sum of $8,758 belongs to the plaintiff and plaintiff is entitled to an equitable lien of $8,758 upon the said recovery of $17,516 and it is entitled to be paid said sum of $8,758.

AS AND FOR A THIRD CAUSE OF ACTION IN THE EVENT THAT THE PLAINTIFF DOES NOT PREVAIL ON THE FIRST CAUSE OF ACTION

11. The plaintiff as attorney for Ove Gustavsson Contracting Co., Inc. rendered various and sundry legal serv-

ices, to said Ove Gustavsson Contracting Co., Inc. and expended various sums of monies for and in behalf of Ove Gustavsson Contracting Co., or advanced monies to said Ove Gustavsson Contracting Co., Inc. from January, 1959 to date, on the promise of said Ove Gustavsson Contracting Co., Inc. to pay for the services and to repay such advances, out of the monies that would fall due it under said contract bearing #NBy-21183.

12. That on or about the 23rd day of May, 1963 Ove Gustavsson Contracting Co., Inc. acknowledged in writing its indebtedness to the plaintiff for the causes and reasons mentioned in the preceding paragraph in a sum in excess of $25,000.

13. That on or about the 23rd day of May, 1963 Ove Gustavsson Contracting Co., Inc. duly assigned all of its right, title and interest in and to the said $17,516 under contract #NBy-21183 to the plaintiff and the said assignments were duly filed and recorded with United States Navy, Bureau of Yards and Docks.

14. That by reason of the foregoing plaintiff is entitled to the balance remaining after deducting the amount paid plaintiff under the second cause of action from the said recovery of $17,516.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $17,516 with interests and costs.

DENIS K. LANE, Esq.,
Attorney for Plaintiff,
917 Fifteenth Street,
Washington, D. C.
STerling 3-1781

Agreement of March 20, 1962

In consideration of any loan or loans which may be made by MARINE MIDLAND TRUST COMPANY (hereinafter called the "Bank") or for other valuable considerations, in hand paid to OVE GUSTAVSSON CONTRACTING CO. INC., a New York corporation of 135 Lakeville Road, New Hyde Park, Long Island, New York (hereinafter called the "Assignor"), and to secure and to provide for the payment of any and all such loan or loans, and any and all notes which may be issued to evidence the same, and any and all other obligations, howsoever arising and whensoever incurred, of the Assignor, the Assignor hereby assigns, transfers and sets over to the Bank, its successors and assigns, all moneys and claims for money due and/or to become due to the Assignor from the UNITED STATES OF AMERICA (hereinafter called the "Government"), under or arising out of that certain Contract No. NBy-21183, dated January 23, 1959, heretofore executed between the Assignor and the United States Government, acting through The Department of the Navy, Bureau of Yards and Docks, New York Naval Shipyard, Brooklyn, New York, for the repair of seawall and replacement of fender, Pier G. New York Naval Shipyard, and any and all amendments thereof and supplements thereto (said Contract and any and all amendments thereof and supplements thereto being hereinafter collectively called the "Contract").

The Assignor hereby specifically authorizes and directs the Government to make all payments due under the Contract direct to the Bank, and hereby irrevocably authorizes and empowers the Bank, as such assignee, to ask, demand, receive, receipt and give acquittance for any and all amounts which may be or become due or payable or remain unpaid at any time or times to the Assignor by the Government under and pursuant to the Contract, and to endorse any checks, drafts or other orders for the payment of money payable to the Assignor in payment thereof, and in the

Bank's discretion to file any claims or take any action or proceeding either in its own name or in the name of the Assignor, or otherwise, which to the Bank may seem to be necessary or advisable in the premises. It is expressly understood and agreed, however, that the Bank shall not be required or obliged in any manner to make any demand, or to make any inquiry as to the nature or sufficiency of any payment received by it, or to present or file any claims, or to take any other action to collect or enforce the payment of any amounts which may have been assigned to the Bank or to which the Bank may be entitled hereunder at any time or times.

The Assignor agrees that any and all moneys received by the Bank from the Government by virtue of this assignment may be applied by the Bank to the payment of any and all such loans, and any and all other obligations of the Assignor as they may appear, in the absolute discretion of the Bank. The Assignor further agrees that it will at any time or from time to time, upon the written request of the Bank, execute and deliver such further documents and do such other acts and things as the Bank may request in order further to perfect the purpose of this assignment.

The Assignor represents to and agrees with the Bank that the Assignor has not transferred, assigned or encumbered the Contract or any rights or interests therein or thereto or any moneys or claims for moneys due or to become due or payable thereunder.

OVE GUSTAVSSON CONTRACTING CO. INC.

By: /s/ OVE GUSTAVSSON, President

Dated: New York, New York
March 20, 1962

Attest: /s/ MARTHA GUSTAVSSON, Secretary

Agreement of March 20, 1962.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On this 20 day of March, 1962, before me personally came OVE GUSTAVSSON to me known, who, being by me duly sworn, did depose and say: That he resides in Queens, New York and that he is President of OVE GUSTAVSSON CONTRACTING Co. INC., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ ANTHONY B. CATALDO
Notary Public, State of New York

Agreement of May 23, 1963

In consideration of any loan or loans made or to be made to Ove Gustavsson Contracting Co. Inc., and in further consideration of services performed or to be performed for Ove Gustavsson Contracting Co. Inc., and to secure and provide payment therefor, said Ove Gustavsson Contracting Co. Inc., a New York corporation, hereinafter called "Assignor", does hereby assign, transfer and set over to Anthony B. Cataldo of 1 Cedar Street, New York 5, New York, his heirs, executors, administrators or assigns, hereinafter referred to as assignee, any and all sums of moneys and claims for moneys due to the assignor under and by virtue of that certain contract No. NBy21183, dated January 23, 1959, heretofore executed between the assignor and the United States Government, acting through the Department of the Navy, Bureau of Yards and Docks, New York Naval Shipyard, Brooklyn, New York, for the repair of seawall and replacement of fender, Pier G, at said New York Naval Shipyard, and expressly and more specifically under and by virtue of the allowance of the claim of the assignor for extras under the aforesaid contract resulting in the ascertainment of the amount due in the sum of $17,516. as determined in change order F amending and supplementing said contract, and the assignor does hereby specifically authorize and direct the Government to make any and all payments under said contract as amended by said change order F direct to the assignee, and, further it does hereby irrevocably authorize and empower, said Anthony B. Cataldo, as such assignee, in his name or in the name of the assignor to ask, demand, receive, receipt and give acquittance, release and/or voucher for any and all amounts which may be or become due or payable or remain unpaid at any time or times to the assignor by the Government under and pursuant to the Contract, as amended, as aforesaid, and to endorse any checks, drafts or orders for the payment of money payable to the Assig-

nor in payment thereof, and to file claim or take any action or proceeding, either in his own name or in the name of the undersigned or otherwise, in such manner and to such extent as to the assignee may seem necessary or advisable to do in the premises and generally to act in relation to any of the foregoing matters as freely and affectually as the undersigned could act if lawfully represented by its duly authorized and elected corporate officers.

The undersigned agrees that it will, at any time, and from time to time, upon the written request of the assignee, execute and deliver such further documents and do other acts and things as the assignee may request in order further to perfect the purpose of this assignment.

IN WITNESS WHEREOF the said OVE GUSTAVSSON CONTRACTING CO. INC. has caused its corporate seal to be hereunto affixed and these presents truly made and executed in the presence of at least two attesting witnesses, after the allowance of its claim for extras as aforesaid, and signed by its duly authorized officer this 23rd day of May, 1963.

OVE GUSTAVSSON CONTRACTING CO. INC.

By: /s/ OVE GUSTAVSSON, President

Witnesses:

/s/ ESTELLE SCHER
/s/ VICTOR PINES

Attest: /s/ DOROTHY ALTMAN, Secretary

Agreement of May 23, 1963.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 23rd day of May, 1963, before me came Ove Gustavsson to me known, who being by me duly sworn did depose and say that he resides in the Borough of Queens, City of New York, that he is the president of Ove Gustavsson Contracting Co. Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

The foregoing instrument having been read to the said Ove Gustavsson by me, the Notary, and the legal force of its clauses having been explained to him, he declared that he understood the said clauses and their legal effects, and signed this instrument on behalf of Ove Gustavsson Contracting Co. Inc., in my presence and in the presence of the witnesses Estelle Scher and Victor Pines both of legal age, the first residing in the City of New York, State of New York, and the second residing in the City of New York, State of New York, both of which witnesses, and the said Ove Gustavsson Contracting Co. Inc., in the presence of each other, and in my presence, signed this instrument as hereinabove set forth.

To all of which I, the Notary, certify.

/s/ ADA W. CATALDO
Notary Public, State of New York

Agreement of April 16, 1964

FOR VALUE RECEIVED, we, the MARINE MIDLAND TRUST COMPANY of 110 William Street, in the Borough of Manhattan, City of New York, do hereby assign, setover and transfer unto ANTHONY B. CATALDO, of 1 Cedar Street in the Borough of Manhattan, City of New York, all of our right, title and interest in and to a certain assignment made to us on the 20th day of March, 1962 by OVE GUSTAVSSON CONTRACTING CO., INC., of all monies due or to become due to it from the United States Government by reason or by virtue of a contract or contracts and modifications thereof for the repair of Pier G and the installation of a fender system to said pier at United States Naval Shipyard, Brooklyn, New York, under number NBy21183; with full power and authority for his own use and benefit, but at his own cost, to ask, demand, sue for, collect, receive, compound and give acquittances for the same or any part thereof.

IN WITNESS WHEREOF, the undersigned has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer on the —— day of April, Nineteen Hundred and sixty-four.

THE MARINE MIDLAND TRUST COMPANY

by /s/ M. COFFEY, Vice President

Agreement of April 16, 1964.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On the 16 day of April, 1964 before me came M. Coffey to me known, who being by me duly sworn did depose and say, that he resides at 87-10 51 Avenue, Elmhurst 73, NY that he is the Vice President of the Marine Midland Trust Company, the corporation described in, and which executed the foregoing assignment; that he knows the seal of the said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

/s/ ROBERT A. SILVESTRI

Notary Public, State of New York

Decision and Final Judgment Below of Dismissal of January 24, 1966

IN THE

UNITED STATES COURT OF CLAIMS

No. 157-65

ANTHONY B. CATALDO

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion to dismiss the petition. Upon consideration thereof, together with the opposition thereto and without oral argument, it is concluded that plaintiff is not entitled to recover since his alleged claim is barred by the Anti-Assignment Act, 31 U.S.C. § 203, and the Assignment of Claims Act of 1940, as amended, and, under the decisions of this court in *Pittman* v. *United States,* 127 Ct. Cl. 173 (1953); *Empire Ordnance Corporation, etc.* v. *United States,* 130 Ct. Cl. 719 (1955); *Kearney* v. *United States,* 152 Ct. Cl. 202 (1961) and *Beaconwear Clothing Company, et al.* v. *United States,* Ct. Cl. No. 226-59, decided January 21, 1966.

IT IS, THEREFORE, ORDERED that defendant's motion to dismiss the petition be and the same is granted and plaintiff's petition is dismissed.

By the Court

WILSON COWEN,
Chief Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1251

ANTHONY B. CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action in the Court of Claims to recover $17,516, which was allegedly an amount owed by the United States on a contract it had entered into with the Ove Gustavsson Contracting Company ("Gustavsson"). The Court of Claims granted the government's motion to dismiss on the ground that petitioner's claim was barred by the Anti-Assignment Act, 31 U.S.C. 203, and the Assignment of Claims Act of 1940, 41 U.S.C. 15 (Pet. App. 36).

The Court of Claims petition alleged that the United States had paid Gustavsson for its contract work in 1960, but that Gustavsson had retained petitioner, who is an attorney, on a 50 percent contingent

218-652—66

fee basis to pursue a claim for "extras" against the United States. On March 20, 1962, Gustavsson assigned all its rights in the claim for "extras" to Marine Midland Trust Company of New York, and on April 16, 1964, Marine Midland executed a further assignment of the claim to petitioner. Gustavsson also executed an assignment of its claim for "extras" to petitioner on May 23, 1963. The claim against the government was settled on or about March 20, 1963 for $17,516, but that amount has never been paid, nor has any warrant for payment been issued.

1. The Court of Claims correctly held that the assignments on which petitioner based his claim were rendered "absolutely null and void" (31 U.S.C. 203) by the federal statutes regulating the assignment of claims against the government. The 1962 assignment from Gustavsson to Marine Midland clearly failed to satisfy the requirements of the first clause of the Anti-Assignment Act because, *inter alia,* it was made before the claim had been liquidated, without the presence of two attesting witnesses and before any warrant for payment was issued. That assignment could, therefore, be valid only under the clause of 31 U.S.C. 203 which provides an exception for assignments to banks or other financing institutions. But under the explicit terms of that clause, "any such assignment * * * shall not be subject to further assignment * * *" (Pet. 5). Marine Midland's 1964 assignment to petitioner violated that restriction upon "further" assignments, and it was, therefore, invalid.

There is no merit to petitioner's contention (Pet. 20) that the reassignment in this case is saved by

the proviso permitting "any such assignment [to] be made to one party as agent or trustee for two or more parties participating in such financing." The petition did not allege that Marine Midland was an "agent or trustee" for petitioner when the claim was assigned to it, and petitioner does not assert that to be the fact. The statute does not authorize the assignee to make a further assignment to his "agent or trustee"; it merely permits the initial assignment to be made to a bank acting on behalf of another person.

Nor could the 1963 assignment by Gustavsson transfer a valid interest to petitioner. Gustavsson had validly assigned its claim to Marine Midland in 1962, and it had nothing left to transfer. Moreover, no warrant for payment had been issued, and such a warrant is a prerequisite for a valid assignment to a private person. 31 U.S.C. 203.

2. Petitioner contends that the prohibitions of the assignment statutes should not apply if the government has no offset or counterclaim against the amount in issue (Pet. 16–17). But one of the principal governmental interests that those statutes were designed to protect was the avoidance of embroilment "in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Corp.*, 300 U.S. 588, 594; *Segal* v. *Rochelle*, 382 U.S. 375, 384. There are conflicting claims in this case between petitioner and the contractor's surety (Pet. 18), and the statutes were plainly designed to apply in such a case. The *Martin* and *Segal* cases, *supra*, on which petitioner relies, involved disputes among private parties after the disbursement

had been made by the government. In these circumstances, the policies of the assignment statutes do not apply as they do when recovery is sought from the United States.

3. Petitioner's contention that he is entitled to recover one-half of the contractor's claim on his attorney's lien is unsound. This Court held in *Nutt* v. *Knut*, 200 U.S. 12, that the assignment statutes prohibited the creation of an attorney's lien upon funds of the United States. The Court of Claims has consistently held that the statutes prohibit an attorney from recovering directly from the government attorneys' fees on funds payable by the United States. *Pittman* v. *United States*, 127 Ct. Cl. 173, certiorari denied, 348 U.S. 815; *Empire Ordnance Corporation, et al.* v. *United States*, 130 Ct. Cl. 719; *Kearney* v. *United States*, 152 Ct. Cl. 202, certiorari denied, 366 U.S. 935.[1]

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[1] Petitioner urges that *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992 (C.A. 2), certiorari denied, 286 U.S. 559, and *Malman* v. *United States*, 202 F. 2d 483 (C.A. 2), rehearing denied, 207 F. 2d 897, conflict with the decision of the Court of Claims in this case and with its earlier *Pittman*, *Kearney* and *Empire Ordnance* cases, *supra*. In *Brooks*, however, the United States had already disbursed the money which was the subject of the suit. And while the court in *Malman* assumed, in a footnote, that an attorney's lien under Section 475 of the New York Judiciary Law was not covered by the assignment provisions, the court's holding was that the attorney was not entitled to recover because of the government's right of set-off against the assignor. We also note that since *Malman* this Court has denied certiorari in the *Pittman* and *Kearney* cases.

4. The government's interest in this litigation is in making an appropriate disbursement of funds it owes, and in avoiding harassment and multiple liability. It is not, of course, interested in retaining possession of funds to which it is not entitled. Under the express terms of the assignment statutes, petitioner is not a proper party to bring an action for these funds and the Court of Claims correctly dismissed his claim. We respectfully submit that a petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966